PP

v.

HASHIM HANAFI

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL TRIAL NO: 45-26-2001]
22 MAY 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Ingredients - Prima facie case - Information leading to facts discovered - Admissibility of statement - Whether drugs discovered as a result of information supplied by accused*

EVIDENCE: *Information leading to facts discovered - Admissibility - Trafficking in dangerous drugs - Information leading to discovery of drugs - Whether could be deposed in paraphrased form - Police having prior knowledge of information - Whether information rendered inadmissible - Act of pointing to drugs by sign language - Whether constituted possession - Evidence Act 1950 ss. 24, 25, 26, 27 - Dangerous Drugs Act 1952 s. 39B(1)(a)*

The accused was charged with trafficking in 13,767.51 grams of cannabis under s. 39B(1)(a) Dangerous Drugs Act 1952. It was not in dispute that the case for the prosecution was principally based on the evidence that the drugs in question were discovered as a result of information supplied by the accused. The facts showed, however, that the accused had first given information regarding the drugs to PW5 and PW4 at the police station and then to PW4 at the scene of the crime. It was also evident that, in respect of the latter information given to PW4, the information comprised only of the accused's act in pointing his mouth towards the white box where the drugs were found ('exh. P17'). Before the learned judge, questions arose as to whether the information supplied by the accused herein was admissible in evidence, and hence, whether a *prima facie* case of trafficking had been made out against the accused.

Held (acquitting and discharging accused without calling for his defence):

[1] The information given by an accused under s. 27 of the Evidence Act 1950 need not be in the actual words used though a written record is desirable. This must be so since s. 27 uses the word "information" and not the word "statement" as used in ss. 17-31 of the Act. Consequently, such information can be deposed in substance or in a paraphrased form. (p 563 e-i)

[2] The information must relate to the place of concealment of the object and the accused's knowledge of it. What is admissible is thus information supplied by the accused which relates to the exact location of the object and its subsequent discovery. This apart, the discovery must be of some fact which the police had not previously learnt from other sources. (p 566 d-e)

[3] The information given by the accused to PW5 is not precise as it does not disclose the exact place where the drugs were concealed. Similarly, the information given by the accused to PW4 at the police station is not precise for the same reason. There was no discovery arising directly and indubitably from these two statements, and consequently the information given by the accused to PW5 and PW4 at the police station cannot be admissible. (p 568 d-e)

[4] The information that caused the discovery of the dangerous drugs here is the information that the accused supplied to PW4 at the scene. It was the questioning of PW4 at the scene that led to the pointing out of the dangerous drugs. What is therefore of relevance is the admissibility of this statement. (p 568 g)

[5] The question put to an accused should not be phrased in such way as to juxtapose the words therein to give the impression that the accused gave information which not only led to the discovery of a fact but also contained an admission. The question should also not carry with it any in-built incriminating evidence in contravention of the requirements of s. 27. It must also be noted that a question asked of an accused and his answer thereto may result in a composite statement of the accused and that of the investigating officer. In that event it may not be possible to say how much of the statement was made by one and how much by the other, with the result that it will not be admissible. (p 570 b-d)

[6] The question that PW4 asked the accused at the scene was whether he had any incriminating articles in his custody and control. The response of the accused was his act of pointing out Exhibit P17 to PW4 by signs. That act was merely a response to the question that was asked and not a direct answer to it. In any event, the expressions used are the very elements that must be proved and they cannot be read with the response of the accused. Even if it is to be read with the response of the accused, the result would be a composite statement where it would not be possible to say how much of the statement was made by the accused. The statement, hence, is inadmissible. (p 570 e-g)

[7] Evidence of the act of pointing out the dangerous drugs by the accused, on its own, is of little value. At the highest, it only shows that the accused had knowledge that the drugs were kept in Exhibit P17 but such knowledge by itself does not constitute possession. Additional evidence is required to link the accused with the dangerous drugs recovered, which is absent. No *prima facie* case had thus been proved against the accused. (p 571 d-e)

Case(s) referred to:
Aber Raja Khima v. State of Saurashtra AIR 1956 SC ***(refd)***
Bhagirath v. State of MP AIR 1959 MP 17 ***(refd)***
DPP v. Hester [1972] 3 All ER 1056 ***(refd)***
Doney v. R [1990] 171 CLR 207 ***(refd)***
Gurusamy v. PP [1965] MLJ 245 ***(refd)***
Hasamuddin Talena v. PP [2002] 2 CLJ 504 CA ***(dist)***
In re Chundru Pallayya AIR 1943 Mad 315 ***(refd)***
In re Peria Guruswami AIR 1941 Mad 765 ***(refd)***
Jaffer Husain v. State of Maharashtra AIR 1970 SC ***(dist)***
Jogen Fangso v. State of Assam 1981 Cr LJ NOC 226 ***(refd)***
Joy v. C I of Police [1989] 1 KLT 443 (Ker) ***(refd)***
Kacharji Hariji v State of Gujarat AIR 1969 Orissa 245 ***(refd)***
Karam Din v. Emperor AIR 1929 Lah 338 ***(refd)***
Karan Singh v. State of UP 1972 All Cr R 125 ***(refd)***
Lim Ah Oh & Anor v. R [1950] MLJ 260 ***(refd)***
Md Desa Hashim v. PP [1995] 4 CLJ 677 FC ***(refd)***
Mohan Lal v. Ajit Singh AIR 1978 SC 1183 ***(dist)***
Mohmed Inayatullah v. State of Maharashtra AIR 1976 SC 483 ***(refd)***
Muhammad Hassan v. PP [1998] 2 CLJ 170 HC ***(refd)***
Naresh Chandra v. Emperor AIR [1942] Cal 593 ***(refd)***
Orissa v. Nursingha [1990] Cr LJ 1676 ***(refd)***
PP v Basri Salihin [1993] 1 CLJ 420 HC ***(refd)***
PP v. Er Ah Kiat [1966] 1 MLJ 9 ***(refd)***
PP v. Hem Sulong & Anor [1990] 1 CLJ 1188 ***(refd)***
PP v. India China Lingiah AIR 1954 Mad 433 ***(refd)***
PP v. Kanapathy Kupusamy [2001] 1 CLJ 61 HC ***(refd)***
PP v. Khoo Boo Hock & Anor [1990] 1 CLJ 971 ***(refd)***
PP v. Norzilan Yaacob & Anor [1989] 1 MLJ 442 ***(refd)***
Pang Chee Meng v. PP [1992] 1 MLJ 137 ***(refd)***
Paramasivan v. State 1990 Cr LJ 1491 ***(refd)***
Phulua v. Emperor AIR 1936 Nag 23 ***(refd)***
Prabhoo v. State of UP AIR 1963 SC 1113 ***(refd)***
Pulukuri Kotayya & Ors v. Emperor AIR 1947 PC 67 ***(refd)***
R v. Kilbourne [1973] AC 729 ***(refd)***
Ramjan Das v. State [1988] 1 Crimes 843 ***(refd)***
Sandra Margaret Birch v. PP [1978] 1 MLJ 72 ***(refd)***
Saw Thean Teik v. R [1953] MLJ 124 ***(refd)***
Sonaram Mahton & Anor v. Emperor AIR 1931 Pat 145 ***(refd)***

State v. Ram Ch AIR 1965 Or 175 ***(refd)***
State of Bombay v. Kathi Kalu AIR 1961 SC 1808 ***(refd)***
State of MP v. Kamprakash 1989 G LJ 1585 ***(dist)***
Sukhan v. Emperor AIR 1929 Lah 344 ***(refd)***
Sum Kum Seng v. PP [1981] 1 MLJ 244 ***(foll)***
Tai Chai Keh v. PP [1948 – 49] MLJ Supp 105 ***(refd)***
Thimma v. State of Mysore AIR 1971 SC 187 ***(refd)***
Vinayak Joshi v. The State AIR 1968 Pun 120 ***(refd)***
Wai Chan Leong v. PP [1989] 2 CLJ 1168 SC ***(refd)***
Yee Ya Mang v. PP [1972] 1 MLJ 120 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 113
Evidence Act 1950, ss. 17, 24, 25, 26, 27, 31, 60(b), 91, 92, 157

Other source(s) referred to:
Sarkar on Evidence, 15th edn, vol 1, p 527

For the prosecution - Mohd Hamzah Ismail, DPP
For the accused - Ameenuddin Ibrahim; M/s Ameen & Co

Reported by WA Sharif

JUDGMENT

Augustine Paul J:

The charge preferred against the accused in this case is as follows:

> Bahawa kamu pada 27 Januari 2001, jam lebih kurang 3.00 pagi di kedai makan M.Rozi Tom Yam, Jalan Bandar Baru Sentul, dalam daerah Sentul, dalam Wilayah Persekutuan Kuala Lumpur, telah mengedar dadah berbahaya iaitu 13,767.51 gram cannabis, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

On 26 January 2001 at about 11.15 p.m. Inspector Roslan bin Hussin (PW5) led a party of police officers to a restaurant called M Rozi Tom Yam ("the restaurant') at Bandar Baru Sentul. There they arrested the accused on suspicion of being involved in drug activities. The restaurant was not searched. After the arrest of the accused the police party arrested two other male Malays named Mohd Nazary bin Mohd Zaki and Jaafar bin Bebakar. They then returned to the police station. While there PW5 was informed by Detective Sergeant Zaman that the accused wanted to tell him something. The accused was then brought to PW5's room and questioned. As PW5 said:

Saya tanya ada lagi barang salah yang kamu simpan. OKT memberitahu ada lagi di belakang kedai. Saya kemudiannya bertanya lagi, berapa banyak. OKT memberitahu, tidak tahu.

PW5 did not keep a record of the interrogation. He then informed Inspector Haslah binti Bachok (PW4) about the information that he had received. As he said:

Selepas itu saya telah memaklumkan kepada SP4 tentang maklumat yang diterima untuk diambil tindakan. Maklumat yang saya beri kepada SP4 ialah OKT memberitahu ada menyimpan barang salah lagi di belakang kedainya.

In this regard PW4 said in her evidence:

Daripada maklumat yang diperolehi semasa saya menyoalsiasat OKT di pejabat, OKT mengaku ada menyimpan dadah ganja di belakang kedai M Rozi Tom Yam.

PW4, PW5 and a police party then went to the restaurant together with the accused. On arrival there PW4, detectives Harbinder Singh (PW7), Mansor and the accused went to the back of the restaurant. PW4 said that she could see a white box (exh. P17) at the back of the restaurant clearly without any difficulty. At the scene she questioned the accused. As she said:

Saya tanya kepada OKT adakah apa-apa barang salah dalam simpanan dan kawalannya. OKT telah menunjukkan P17 kepada saya. OKT menunjukkan peti itu dengan mulutnya. Saya juga ada bertanya pada suspek apa ada dalam peti itu. OKT menjawab: Ganja.

She did not keep a record of the interrogation. But it was supported by the evidence of PW7 who said:

Insp Haslah telah tanya beberapa soalan iaitu, adakah apa-apa barang salah dalam simpanan atau kawalan kamu. Tertuduh jawab, ada dadah ganja. Kemudian Insp Haslah tanya, di mana. Tertuduh menunjukkan ke arah satu peti warna putih dengan isyarat mulut.

PW7 said that he could see exh. P17 on arrival at the scene and it was not hidden. PW4 then went towards exh. P17 and opened it. She recovered from it two plastic packets suspected to be cannabis. The seized items were sent to Halimah binti Abdul Karim (PW1), a chemist attached to the Chemistry Department, Kuala Lumpur. She found them to contain 13,767.51 grammes of cannabis. Musliha binti Alias (PW6) identified the accused as the owner of the restaurant. That in substance is the evidence adduced by the prosecution at the close of its case.

The case for the prosecution thus rested on evidence of information admissible under s. 27 ("s. 27") of the Evidence Act 1950 ("the Act"). The submission advanced by both parties centred essentially on the following issues:

(a) absence of a record of the information;

(b) the proper information that is admissible;

(c) the significance of the question in response to which the accused gave the information; and

(d) the evidentiary value of the information.

I consider it necessary to set out s. 27 which reads as follows:

> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

This section is an exception to the law of confession as contained in the preceding ss. 24, 25 and 26 (see *Lim Ah Oh & Anor v. R* [1950] MLJ 260). Accordingly, it should be construed and applied strictly (see *Wai Chan Leong v. PP* [1989] 3 MLJ 356). It should also be construed as favourably to the accused as possible (see *Naresh Chandra v. Emperor* AIR 1942 Cal 593). In invoking s. 27 the court should be very vigilant to ensure the credibility of the evidence tendered as it is so vulnerable to abuse (see *Pang Chee Meng v. PP* [1992] 1 MLJ 137). In its relationship to s. 113 of the Criminal Procedure Code which also deals with the admissibility of statements made to a police officer both sections stand independently of each other (see *Wai Chan Leong v. PP* [1989] 3 MLJ 356). The words " … so much of such information … as relates distinctly to the fact thereby discovered … " are significant and form the focus of the section. The word "relates" in the section means to "have reference to" or "to connect"; and the word "distinctly" means clearly, strictly, unmistakably, decidedly, indubitably or directly (see *Sukhan v. Emperor* AIR 1929 Lah 344; *Yee Ya Mang v. PP* [1972] 1 MLJ 120; *Mohmed Inayatullah v. State of Maharashtra* AIR 1976 SC 483). Thus the information must be clearly connected with the fact. It must be such as to have caused the discovery of a fact. In other words the fact must be the consequence and the information the cause of its discovery. In explaining the nature of the information rendered admissible by s. 27 Sir John Beaumont in delivering the advice of the Privy Council in *Pulukuri Kotayya & Ors v. Emperor* AIR 1947 PC 67 said at pp. 70-71:

Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr Megaw, for the Crown, has argued that in such a case the 'fact discovered' is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to section 26, added by section 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

> High Courts in India have generally taken the view as to the meaning of section 27 which appeals to their Lordships, and reference may be made particularly to 10 Lah 283 and 56 Bom 172 on which the appellants rely, and with which their Lordships are in agreement. A contrary view has, however, been taken by the Madras High Court, and the question was discussed at length in a Full Bench decision of that court in ILR (1937) Mad 695 where the cases were referred to. The court, whilst admitting that the weight of Indian authority was against them, nevertheless took the view that any information which served to connect the object discovered with the offence charged was admissible under section 27. In that case the court had to deal with a confession of murder made by a person in police custody, and the court admitted the confession because in the last sentence (readily separable from the rest) there was an offer to produce two bottles, a rope, and a cloth gag, which, according to the confession had been used in, or were connected with, the commission of the murder, and the objects were in fact produced. The court was impressed with the consideration that as the objects produced were not in themselves of an incriminating nature their production would be irrelevant unless they were shown to be connected with the murder, and there was no evidence so to connect them apart from the confession. Their Lordships are unable to accept this reasoning. The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into section 27 something which is not there, and admitting in evidence a confession barred by section 26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law.
>
> In their Lordships' opinion ILR 1937 Mad 695 was wrongly decided, and it no doubt influenced the decision now under appeal.

It is therefore clear that in cases where possession of an object constitutes the gist of the offence charged information relating to the discovery of a fact can form the foundation of the prosecution case.

I shall now deal with the issues that I had identified earlier.

(a) Absence of a record of the information

It will be observed that the evidence of the information given by the accused as testified by PW4 and PW5 is in a paraphrased form with no written record of the actual words used. Learned counsel contended that this is fatal to the admissibility of the information. These issues have been decidedly determined by the Federal Court in *Sum Kum Seng v. PP* [1981] 1 MLJ 244. In that case the information supplied was that "the accused admitted burying weapons

somewhere and offered to show me the place." With regard to the objection that was advanced on the ground that the information must have been in the actual words used by the accused Chang Min Tat FJ said at p. 245:

> The fact that the information was told the trial court in substance does not, per se, make it admissible (sic). All the more so, when, as it so clearly appears in this case, it was only in indirect speech and it was so close to the direct that there was no apparent difference. 'The accused admitted burying weapons somewhere and offered to show me the place' is but an indirect rendering and not a paraphrase or a substitute of 'I have buried weapons somewhere and I can show you the place'.
>
> This means that the attack on the admissibility of the evidence which so completely inculpates the appellant is entirely without foundation and the appeal must be dismissed.
>
> But before leaving this appeal we should express our clear view that while there is no strict necessity at law to give the actual words used by an accused person in supplying the information that led to the discovery of a fact or thing and comes within the provisions of section 27, both the decisions referred to and commonsense stress the desirability that the actual words be recorded somewhere.

It is therefore clear beyond doubt that the information given by an accused under s. 27 need not be in the actual words used though a written record is desirable. This is justified on the ground that s. 27 uses the word "information" and not the word "statement" which is used in sections 17 to 31 of the Act (see *Bhagirath v. State* of MP AIR 1959 MP 17). In *Yee Ya Mang v. PP* [1972] 1 MLJ 120 reference was made to *Karam Din v. Emperor* AIR 1929 Lah 338 where Dalip Singh J in considering the scope of the word "information" in s. 27 said at p. 340:

> In connection with this it is necessary to bear in mind that the word 'information' cannot be used as synonymous with the word 'statement'. There is no reason why the word 'information' should have been used instead of the word 'statement' in the section if by, 'information' statement was intended. The word 'information' as distinct from the word 'statement' connotes two things, namely a statement or other means employed for imparting knowledge possessed by one person to another, and the knowledge so derived by the other person.

As "information" includes knowledge derived by a person it can be given in testimony in any form so long as it is within the ambit of the knowledge so derived. It can therefore be deposed in substance or in a paraphrased form. Such form of testimony, though admissible, may adversely affect its evidentiary value. In some cases the prosecution may rely entirely on the information

supplied in proof of its case. If the paraphrased words are ambiguous the prosecution will be unable to prove matters allegedly contained in the statement. The prosecution may thus fail in its attempt to establish certain elements. The difficulties associated with evidence of an information in a paraphrased form and when it is in the actual words used by the accused was lucidly explained in *Bhagirath v. State* of MP AIR 1959 MP 17 where Chaturvedi J said at p 20:

> The difference between 'I have kept the ornaments inside that bush' and 'the ornaments are kept or will be found inside that bush' can well be realised. While the first sentence connotes that the accused had exclusive possession of the ornaments, at least for some time, after the theft, so that he was in a position to keep those ornaments inside 'that bush'; the second sentence would only imply that the accused person somehow acquired the knowledge about their whereabouts and his case will then come within the dictum laid down in para 7 of *Trimbak v. State* of MP AIR 1954 SC 39 (E) and the discovery would not be regarded as conclusive proof that the accused was ever in possession of those ornaments.

To avoid such difficulties it may be desirable for the actual words used to be adduced in evidence, though, failure to do so is not fatal to its admissibility. The relevancy of the information adduced in evidence in *Sum Kum Seng v. PP* [1981] 1 MLJ 244 posed no problem as it was very close to its direct form in order to show that the accused was in possession of the ammunition. In that case the Federal Court also stressed on the desirability of keeping a record of the words used. The existence of a written record will help to resolve what exactly was stated in the event of any ambiguity arising (see *PP v. Hem Sulong & Anor* [1990] 1 CLJ 1188). The rationale for the stand taken by the Federal Court is manifestly patent. Information given under s. 27 is not a matter that is required by law to be in writing so as to be governed by ss. 91 and 92 of the Act. Therefore the information must be proved by oral evidence pursuant to s. 60(b) of the Act. Thus a written record of the information given by the accused will not by itself be substantive evidence of its contents and it is what the witness deposes in court as having been said by the accused that will be evidence (see *Bhagirath v. State* of MP AIR 1959 MP 17). Where the information is contained in a police diary it can only be used for the purpose of refreshing memory (see *PP v. Er Ah Kiat* [1966] 1 MLJ 9). Where it is contained in any other document it can, at the highest, serve only as evidence of corroboration. It is on this basis that a report prepared by a chemist pertaining to his analysis of drugs cannot be tendered as substantive evidence of its contents but only as corroboration of his oral evidence in Court under s. 157 of the Act (see *Saw Thean Teik v. R* [1953] MLJ 124; *Muhammad bin Hassan v. PP* [1998] 2 CLJ 170 FC). The purpose of corroboration is

not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible (see *DPP v. Hester* [1972] 3 All ER 1056). Its role is to confirm other evidence in the sense that it renders that other evidence more probable (see *Doney v. R* [1990] 171 CLR 207; *R v. Kilbourne* [1973] AC 729). It cannot therefore amount to that other evidence itself. Thus the record of an information will only enhance the credibility of the witness and the absence of it cannot render the oral evidence of it inadmissible; nor can it be a substitute for the evidence that it is meant to corroborate. Such corroborative evidence cannot be insisted upon when s. 27 is activated as the oral evidence of information is not a matter that requires corroboration in law or in practice. It follows that the absence of a written record cannot affect the admissibility of the oral evidence of the information. It is of course desirable to have such a record as pointed out by the Federal Court. I consider it necessary at this stage to refer to the recent judgment of the Court of Appeal in *Hasamuddin Talena v. PP* [2002] 2 CLJ 504 where it was held that information given under s. 27 must be exact and recorded in the language or words used by the accused. It is my view that this case is peculiar to its own facts in the light of what I have said thus far and in particular the pronouncement by the Federal Court in *Sum Kum Seng v. PP* [1981] 1 MLJ 244. As the information adduced in evidence in the Court of Appeal judgment does not appear to be sufficient to prove possession the requirement that the exact words ought to have been adduced in evidence accords with the current law. As the judgment in that case is focussed on the absence of evidence of the exact words used the reference to the written record is obiter and the binding effect of *Sum Kum Seng v. PP* [1981] 1 MLJ 244 is therefore not affected at my level. The objection raised by learned counsel cannot therefore be sustained.

(b) The proper information that is admissible

The evidence reveals that the accused had given information first to PW5 and then to PW4. In the case of PW4 it was on two occasions; one at the police station and the other at the scene. This brings into focus the admissibility of information under s. 27 when the police already have prior knowledge of it. Before I proceed any further it is necessary to consider what constitutes "prior knowledge" of an information for the purpose of s. 27. In *PP v. Lim Kee Chuan* (25 April 1992, WPPJ 47-61-90, unreported) Abdul Aziz J held that the mere fact that the police had knowledge or information that the accused was keeping certain drugs did not bar the admission of the confession made subsequently by the accused as to where exactly the drugs were hidden. What it means is that the prior knowledge must refer to the exact location of the drugs. Visu Sinnadurai J was of the view that this was a wide interpretation

of s. 27. His Lordship said in *PP v. Basri Salihin* [1993] 1 CLJ 420 that any prior knowledge by the police that the accused had in his possession or had hidden drugs in a particular place, though the exact and specific location had not been identified, would make the subsequent confession of the accused inadmissible. A resolution of the two conflicting views requires a consideration of the nature of the evidence that is rendered admissible by s. 27. The section provides that " … so much of such information … as relates distinctly to the fact thereby discovered, may be proved". It follows that the information that is admissible must relate distinctly to the fact discovered. It was made abundantly clear by the Privy Council in *Pulukuri Kotayya & Ors v. Emperor* AIR 1947 PC 67 that it is fallacious to treat the "fact discovered" as equivalent to the object produced; the fact discovered embraces the place from which the object is produced, and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. The discovery must be the direct cause of the information (see *Jaffer Husain v. State of Maharashtra* AIR 1970 SC 1934). Thus the information must relate to the place of concealment of the object and the accused's knowledge of it. What is admissible is therefore information supplied by the accused which relates to the exact location of the object and its subsequent discovery. Since the information supplied by the accused must lead to the discovery of the object it means that the discovery must be of some fact which the police had not previously learnt from other sources and the knowledge of the fact should be first derived from information supplied by the accused (see *Thimma v. State of Mysore* AIR 1971 SC 187; *Joy v. C I of Police* [1989] 1 KLT 443 (Ker)). Thus the discovery must be made by virtue of and exclusively as a result of information given by the accused (see *Ramjan Das v State* [1988] 1 Crimes 843). In this regard Nik Hashim J said in *PP v. Kanapathy Kupusamy* [2001] 1 CLJ 61 at p. 69:

> To constitute 'information' under the section, the information must come from the accused and nobody else.

If the police have prior knowledge of the information supplied by the accused obviously the subsequent discovery will be based on such prior knowledge and not on that of the accused. It will thus render the information supplied by the accused inadmissible as it will not be the cause of the discovery. It must be remembered that s. 27 is based on the view that if a fact is actually discovered in consequence of information given some guarantee is afforded thereby that the information is true, and accordingly can be safely allowed to be given in evidence (see *Pulukuri Kotayya & Ors v. Emperor* AIR 1947 PC 67). It follows that prior knowledge which will make s. 27 inapplicable must be of such a nature that it must be capable on its own of leading to the discovery of the object. If it does not have that effect then the cause of the discovery

will still be the information supplied by the accused and not the prior knowledge of the police. In that event the information supplied by the accused will be admissible as the information that the police have will not amount to prior knowledge. The corollary is that information that the accused has drugs or has hidden the drugs without any further information on their exact location will not amount to prior knowledge. In support I refer to *Md Desa bin Hashim v. PP* [1995] 4 CLJ 677 where Gopal Sri Ram JCA said at p. 687:

> If an investigating agency has prior knowledge of the whereabouts of the article that is recovered, then the section does not apply.

The "whereabouts" of an article is a reference to its exact place of location. In further support I refer to the Indian Supreme Court case of *Aber Raja Khima v State of Saurashtra* AIR 1956 SC 217 where it was held that discovery of hidden incriminating articles said to have been recovered by the accused is inadmissible if the police already knew where they were hidden. As s. 27 has no application where the investigating agency has prior knowledge of the whereabouts of the object that is recovered it follows that where the accused makes more than one statement it is only the first statement that is admissible; the second is not (see *Md Desa bin Hashim v. PP* [1995] 4 CLJ 677). This is because the second statement is a mere repetition of the first statement of which the police already have knowledge. However, if the first statement of the accused is vague and the precise information is received as a result of a subsequent statement by him it is the latter that is admissible (see *Vinayak Joshi v. The State* AIR 1968 Pun 120). This is for the obvious reason that the first statement, being not precise, is not the cause of the discovery and is therefore not admissible. When the information contained in the statement of the accused does not disclose the exact place where the object was kept concealed by him then even if the object is recovered it cannot be said that it was recovered pursuant to the information furnished by the accused (see *Paramasivan v. State* [1990] Cr LJ 1491; *State v. Ram* Ch AIR 1965 Or 175; *Orissa v. Nursingha* [1990] Cr LJ 1676).

As I said earlier the accused had given information on three occasions. On the first occasion it was to PW5 at the police station. In this regard PW5 said:

> Saya tanya ada lagi barang salah yang kamu simpan. OKT memberitahu ada lagi di belakang kedai.

On the second and third occasions it was to PW4. The first was at the police station. As PW4 said:

> Daripada maklumat yang diperolehi semasa saya menyoalsiasat OKT di pejabat, OKT mengaku ada menyimpan dadah ganja di belakang kedai M Rozi Tom Yam.

The second was at the scene. As PW4 said:

> Saya tanya kepada OKT adakah apa-apa barang salah dalam simpanan dan kawalannya. OKT telah menunjukkan P17 kepada saya. OKT menunjukkan peti itu dengan mulutnya. Saya juga ada bertanya pada suspek apa ada dalam peti itu. OKT menjawab: Ganja.

The information that is admissible in this case will be the one that clearly and decidedly led to the discovery of the drugs. A statement without any discovery does not prove anything (see *State of MP v. Kamprakash* 1989 G LJ 1585). It must be remembered that the word "distinctly" in s. 27 is designed to limit and confine the information which may be proved within definite limits and not to include everything which may relate to that information (see *Karam Din v. Emperor* AIR 1929 Lah 338). The information that is admissible under s. 27 is the knowledge of the accused of the place from which an object is produced and the information must relate distinctly to this fact. The information given by the accused to PW5 is not precise as it does not disclose the exact place where the drugs were concealed. Similarly the information given by the accused to PW4 at the police station is not precise for the same reason. It is also the very information that PW5 gave to PW4. There was no discovery arising directly and indubitably from these two statements. Thus they do not relate distinctly to the place from which the dangerous drugs were finally recovered. Accordingly, the information given by the accused to PW5 and to PW4 at the police station are not admissible. I hasten to add that if either one of the two statements had been followed by a pointing out of the dangerous drugs by the accused then that particular statement preceding the act would have constituted information within the meaning of s. 27. The subsequent act will not be invalidated by virtue of the police having knowledge pursuant to the first statement as both came from the accused (see *PP v. India China Lingiah* AIR 1954 Mad 433; In *re Chundru Pallayya* AIR 1943 Mad 315). Thus the information that caused the discovery of the dangerous drugs is the information that the accused supplied to PW4 at the scene. It was the questioning of the accused by PW4 at the scene that led to the pointing out of the dangerous drugs. What is therefore of relevance is only the admissibility of this information. As I have said earlier the fact that PW4 had prior information will not vitiate the admissibility of the information.

(c) *The significance of the question in response to which the accused gave the information*

As I said earlier in order for a discovery to come within the meaning of s. 27 it must be based exclusively on information supplied by the accused person. Information obtained pursuant to an interrogation does not affect its admissibility

under s. 27 (see *Mohan Lal v. Ajit Singh* AIR 1978 SC 1183). An interrogation will be a question and answer session. The critical issue for determination is whether the question from the interrogator can be read into the answer of the accused so as to form part of the information supplied. This is significant as it may have a substantial bearing on the admissibility and evidentiary value of the answer. The evidence shows that the information given by the accused to PW4 at the scene was his act of pointing out in response to a question that was asked. The question which was paraphrased in evidence is as follows:

> Saya tanya kepada OKT adakah apa-apa barang salah dalam simpanan dan kawalannya.

What has to be determined is whether the question must be read with the act of the accused. If it is to be so read it will mean that the accused has admitted that the incriminating article was in his custody and control. I will attempt to resolve the problem posed by way of an illustration. Supposing the question asked is:

> Where are the drugs?

And the answer is

> In the drawer.

If the answer is read in isolation without reference to the question posed it would end up as being meaningless. The words "in the drawer" on their own do not mean anything. As Scroope J said in *Sonaram Mahton & Anor v Emperor* AIR 1931 Pat 145 at p. 147:

> ... we cannot garble the statement made to the police so as to render it absolutely innocuous to the prisoner and remove it entirely from the nature of a confessional statement.

It is therefore implicit that the answer in the illustration that I have referred to must be read together with the question and understood as:

> The drugs are in the drawer.

That, in my opinion, would be the information supplied by the accused. Thus evidence of the question asked is imperative on the facts of a particular case in order to have a proper appreciation of the answer (see *PP v. Khoo Boo Hock & Anor* [1990] 1 CLJ 971). It follows that in certain circumstances the question asked has to be read with the answer given by the accused. Be that as it may, in view of the strictness with which s. 27 must be construed by virtue of it being an exception to the preceding three sections extreme care and caution must be exercised in reading the question posed with the answer.

It has thus been held that the protection afforded by ss. 24, 25 and 26 of the Act should not be dependent on the ingenuity of the police officer in composing the narrative conveying the information relating to the alleged discovery of a fact (see *Sonaram Mahton & Anor v. Emperor* AIR 1931 Pat 145; *Phulua v. Emperor* AIR 1936 Nag 23). The information should not be given by any prompting with any pointed question (see *Sarkar on Evidence* 15th edn, Vol I p 527). The question put should not be phrased in such a way so as to juxtapose the words therein to give the impression that the accused gave information which not only led to the discovery of a fact but also contained an admission (see *PP v. Norzilan Yaacob & Anor* [1989] 1 MLJ 442). The question should also not carry with it any in-built incriminating evidence in contravention of the requirements of section 27. A reading of the sort of questions that I have outlined with the answer given may result in it being a composite statement of the accused and that of the investigating officer. In that event it may not be possible to say how much of the statement was made by one and how much by the other with the result that it will not be admissible (see *In re Peria Guruswami* AIR 1941 Mad 765). This is because it will not in law amount to knowledge derived from the accused so as to fall within the meaning of "information" in s. 27.

The question that PW4 asked the accused at the scene was whether he had any incriminating articles in his custody and control. The response of the accused was his act of pointing out exh. P17 to PW4 by signs. That act was merely a response to the question that was asked and not a direct answer to it. It does not mean that he agreed with the question. In any event the expressions used in the question are the very elements that must be proved as prescribed by statute. They are technical and cannot be easily understood. They appear to have been designed to give evidentiary value and weight to the answer to be given. Thus they cannot be read with the response of the accused. Even if it is argued that the question must be read with the response of the accused the result will be a composite statement where it would not be possible to say how much was made by the accused. In such circumstances the resultant statement will be inadmissible. Even if it is not to be read as a composite statement the position will be that there are two possible inferences that can be drawn from the conduct of the accused; one that the accused agreed with the question and the other that he did not. It is settled law that where a statement made by a person can be interpreted in two ways, one that he had knowledge where the object was hidden, and two, he had hidden the object, the interpretation which is favourable to the accused has to be adopted (see *Jogen Fangso v. State of Assam* 1981 Cr LJ NOC 226; *Tai Chai Keh v. PP* (1948 – 49) MLJ Supp 105). This is because the first possibility is

compatible with the innocence of the accused and he is entitled to the benefit of doubt (see *Mohmed Inayatullah v. State of Maharashtra* AIR 1976 SC 483). Thus the interpretation to be accorded to the act of the accused is that it does not mean that he agreed with the question. The information that is admissible against him is therefore only his bare act of pointing out the dangerous drugs to PW4. It amounts to evidence of conduct. Where an accused produces the weapon of attack or points out the place of its concealment his conduct itself is tantamount to making a statement or conveying information and is admissible under s. 27 (see *Karan Singh v. State of UP* 1972 All Cr R 125; *State of Bombay v. Kathi Kalu* AIR 1961 SC 1808; *Prabhoo v. State of UP* AIR 1963 SC 1113; *Wai Chan Leong v. PP* [1989] 2 CLJ 1168 SC). It can also amount to evidence of conduct under s. 8 of the Act (see *Kacharji Hariji v. State of Gujarat* AIR 1969 Orissa 245).

(d) *The evidentiary value of the information*

Evidence of the act of pointing out the dangerous drugs by the accused on its own is of little value (see *Tai Chai Keh v. PP* [1948 – 49] MLJ Supp 105; *Sandra Margaret Birch v. PP* [1978] 1 MLJ 72). It will at the highest only show that the accused had knowledge that dangerous drugs were kept in exh. P17 but such knowledge by itself does not constitute possession (see *Gurusamy v. PP* [1965] MLJ 245). It is only one of the elements required to establish possession. Additional evidence is required to link the accused with the dangerous drugs recovered which is absent.

In the upshot I was satisfied that the prosecution had failed to make out a *prima facie* case against the accused. Accordingly, I acquitted and discharged him without calling upon him to enter his defence.